
Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
Sandwich Isles Communications, Inc.)
Petition for Waiver of the Universal Service)
And Intercarrier Compensation Rules)

WC Docket No. 10-90
WT Docket No. 10-208

To: The Commission

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

**APPLICATION FOR REVIEW OF
FREEDOM OF INFORMATION ACT REQUEST**

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Sandwich Isles Communications, Inc. (“Sandwich Isles”), by its attorneys and pursuant to Sections 0.461(i) and 1.115 of the Commission’s Rules, hereby applies to the Commission for review of the decision made by the Wireline Competition Bureau (the “Bureau”), as contained in its letter dated July 3, 2012, regarding FCC FOIA Control No. 2012-116.¹ For reasons stated herein, it is respectfully requested that the Bureau’s decision be reversed or set aside.

I. BACKGROUND

In its Waiver Petition, filed December 30, 2011, Sandwich Isles sought relief from recently adopted changes to Section 54.302 and other regulatory provisions of the Commission’s Universal Service rules.² Along with the Waiver Petition, Sandwich Isles filed a request for confidential treatment of certain portions of the Waiver Petition, including among others its audited financial statements and notes for various two year terms contained in Exhibit B of the Waiver Petition (the “Audited Financials”).³ In its request for confidential treatment, Sandwich

¹ Letter from Kirk S. Burgee, Chief of Staff, Wireline Competition Bureau, Federal Communications Commission to David Burstein, Editor and Publisher, DSL Prime (July 3, 2012) [hereinafter *Bureau Decision*].

² Sandwich Isles Communications Petition for Waiver of 47 C.F.R. § 54.302, WC Docket No. 10-90, WT Docket No. 10-208 (filed Dec. 30, 2011) [hereinafter *Waiver Petition*].

³ Letter from Albert Hee, Sandwich Isles Communications, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90, WT Docket No. 10-208 (filed Dec. 30, 2011) [hereinafter *Request for Confidential Treatment*].

Isles asserted that public disclosure of its audited financial statements would cause it substantial competitive harm.⁴

On January 13, 2012, Sandwich Isles received notification from the Commission that a David Burstein had filed a FOIA request (“FCC FOIA 2012-116”) seeking “an accounting of how much money Sandwich Isles currently collects and how much they would lose.”⁵ Pursuant to Section 0.461(d)(3) of the Commission’s Rules, Sandwich Isles was given an opportunity to object to FCC FOIA 2012-116. On January 23, 2012, Sandwich Isles submitted a response (“Request for Confidential Treatment”) in which it reasserted its request for confidential treatment of certain portions of the Waiver Petition, including the Audited Financials.⁶ Sandwich Isles specifically asserted that its financial disclosures and audited financials were exempt from disclosure under FOIA Exemption Four, which protects “commercial or financial information obtained from a person and privileged or confidential.”⁷

On July 3, 2012, the Bureau responded to Sandwich Isles’ Request for Confidential Treatment by denying in part and granting in part FCC FOIA 2012-116.⁸ Of particular significance, the Bureau determined to release various confidential and commercially sensitive documents, including Sandwich Isles’ Audited Financials and Notes, a List of Outstanding Loans, and a Summary of Corporate Operating Expenses (collectively referred to herein as “Confidential Documents”), based on a mistaken interpretation of Paragraph 602 in the *USF/ICC Transformation Order*.⁹ Accordingly, for the reasons set forth below, Sandwich Isles requests

⁴ *Id.*

⁵ Letter from Kesha Woodward, Telecommunications Analyst, Wireline Competition Bureau, Federal Communications Commission, to Albert Hee, President, Sandwich Isles Communications (January 13, 2012).

⁶ Letter from Frederick Joyce, on behalf of Sandwich Isles Communications, to Patricia Quartey, Federal Communications Commission (Jan. 23, 2012) [hereinafter *January Letter*].

⁷ 5 U.S.C. § 552(b)(4).

⁸ *Bureau Decision*, *supra* note 1.

⁹ *Id.* at 6.

review and reversal of the Bureau's decision to release these confidential and commercially sensitive documents.

II. QUESTION PRESENTED FOR REVIEW

Whether the Bureau's decision to release Sandwich Isles' Confidential Documents that were submitted with its Waiver Petition should be reversed or set aside because it is in violation of the FOIA statute, the FCC's FOIA regulations, and not in accordance with the *USF/ICC Transformation Order*.

A. FACTORS WARRANTING COMMISSION CONSIDERATION OF THE QUESTION PRESENTED

The Bureau's decision to release Sandwich Isles' Confidential Documents is in conflict with Commission precedent and policy as articulated in the *USF/ICC Transformation Order*. Consequently, the Commission should review this question pursuant to Section 1.115(b)(2)(i) of the Commission's Rules and reverse the Bureau's decision.

1. Paragraph 602 of the *USF/ICC Transformation Order* Does Not Support Disclosure of Sandwich Isles' Comprehensive Financial Data.

The core question presented for Commission review here is whether the annual financial disclosure requirements for Eligible Telecommunications Carriers (ETCs) adopted in the *USF/ICC Transformation Order* are identical to the financial disclosures required of RLECs seeking a waiver of that *Order*. The short answer is that they are not the same. The Bureau's FOIA decision mistakenly treats them as comparable. It is this error that should be reversed.

The Bureau decided to release Sandwich Isles' Audited Financials, confidential Notes, and other Confidential Documents based on Paragraph 602 of the *USF/ICC Transformation Order*.¹⁰ In Paragraph 602, the Commission concluded that "these [ETC] carriers' financial disclosures should be made publicly available." *Connect America Fund et al.*, WC Docket No.

¹⁰ *Bureau Decision*, *supra* note 1 at 6.

10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 17663, 17872, ¶ 602 (2011) [hereinafter *USF/ICC Transformation Order*]. The “financial disclosures” referenced are those referred to in Paragraphs 598 through 601 of the *USF/ICC Transformation Order*. See *Id.* at 17872. These include: “full and complete annual report[s] of...financial condition” filed with the Commission by privately-held rate-of-return carriers receiving high-cost and/or CAF support and annual financial reports provided to the Rural Utility Service (RUS) by ETCs that receive loans from the RUS. *Id.*, ¶¶ 598, 599. The full Commission delegated to the Wireline Competition Bureau the “authority to resolve all other questions regarding the appropriate format for carriers’ first financial filing following this Order, as well as the authority to set the format for subsequent reports.” *Id.* at ¶ 600.

Sandwich Isles’ Confidential Documents do not fall into either of these categories. They were not filed with the Commission because Sandwich Isles receives high-cost and/or CAF support, nor were they provided to RUS as part of Sandwich Isles’ annual reporting obligations. Rather, the Confidential Documents were submitted to the FCC as part of Sandwich Isles’ Waiver Petition, in accordance with Paragraph 542 of the *USF/ICC Transformation Order*.

The reporting rules and the scope of the financial disclosures required by the FCC under Paragraph 542’s waiver procedures are not the same as the ETC annual filing requirements of Paragraph 602. The Bureau’s decision to treat them as identical was a mistake. The fact is that the financial data and other carrier information required to be submitted to the FCC with a Petition for Waiver, as described in Paragraph 542 of the *USF/ICC Transformation Order*, is far more comprehensive and far more commercially sensitive than the new financial filings described in Paragraphs 595 through 602 of the *USF/ICC Transformation Order*.

The differences are described in the *USF/ICC Transformation Order* itself. A petition for

waiver requires a comprehensive financial disclosure that must “include all financial data and other information sufficient to verify the carrier’s assertions,” including “[a]udited financial statements and notes to the financial statements...” *Id.*, at ¶ 542. Petitions for waiver are required to provide much more financial data than would be routinely required of ETC’s in their annual reports. Such data is to include “unaudited financial statements for the most recent three fiscal years ... cash flow statements ... [and] information regarding costs and revenues associated with unregulated operations, e.g., video or Internet.” *Id.* That is precisely the type of confidential financial information that Sandwich Isles filed with its Petition for Waiver; it is not the type of commercially sensitive information that would routinely be made available to the public even under the new disclosure rules described in Paragraph 602 of the *USF/ICC Transformation Order*.

By contrast, the annual financial reporting requirements that were adopted in the *USF/ICC Transformation Order* were, by the FCC’s own admission, intended to be “a less burdensome” form of disclosure. *Id.* at ¶ 596. Put differently, had the FCC intended the petition for waiver financial disclosure requirements to be comparable to its newly adopted annual filing requirements, it presumably would have said as much in the *USF/ICC Transformation Order* that addressed both of these matters. But, that is not at all what the *USF/ICC Transformation Order* states. Rather, the annual financial disclosure requirements for ETCs were evidently meant to be “less burdensome,” less comprehensive and far less commercially sensitive than the data that would be required to accompany a petition for waiver. There is simply no other way to reconcile the differently drafted sections of the same rulemaking order.

In short, the Bureau’s FOIA decision erred by failing to distinguish these two regulatory requirements. The more comprehensive and commercially sensitive financial statements and

notes that were submitted with Sandwich Isles' Waiver Petition are simply not akin to what privately-held rate of return carriers will be required to file with the FCC on an annual basis. Indeed, given that the Bureau has yet to establish what the annual financial filing format will be, it was error for the Bureau to conclude that Sandwich Isles' Audited Financial Statements and Notes were "comparable" to the newly adopted annual reports. Sandwich Isles' Confidential Documents contain more commercially sensitive, "raw data" than the type that ETCs would otherwise be required to disclose in their annual reports; consequently, the Bureau's decision should be reversed. *See, e.g., Qwest Communications International, Inc., v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000).

2. Disclosure of Commercially Sensitive Information Should be Narrowly Construed Under FCC Precedents.

Even if some of the financial information submitted with Sandwich Isles' Petition for Waiver might at some future date be made publicly available under new annual disclosure requirements, the FCC should nevertheless decline the invitation to disclose that confidential information in this FOIA proceeding. The Bureau's FOIA decision should be set aside and reversed because it would require the agency to engage in a time-consuming and risky analysis to determine what types of financial information submitted with the Petition for Waiver might arguably be available to the public at some time in the future when the Bureau adopts its new annual filing requirements for ETCs.

The FCC and courts of review have previously stated that this agency should decline requests to engage in this type of "segregation" analysis. *See, e.g., In re Lakin Law Firm, P.C.*, 19 F.C.C. R. 12727 (2004). The FCC should decline to authorize its employees to "segregate nonexempt information" because "the necessary redaction would require the agency to commit significant time and resources to a task that would yield a product with little, if any,

informational value.” *Assassination Archives & Research Center v. CIA*, 177 F.Supp. 2d 1, 9 (D.D.C. 2001) (cited in *Lakin Law Firm*). These holdings should apply to this FOIA proceeding.

To the extent that some of Sandwich Isles’ financial information may be available to the public in the future as part of the new filing reports that the Bureau has yet to promulgate, no public interest justification has been proffered for bypassing those regulatory procedures in this particular FOIA proceeding. Rather, Sandwich Isles’ financial information should be subject to the same regulatory and public scrutiny as would any comparably situated, privately owned rate of return carrier. Neither the proponent of this FOIA request nor the Bureau has offered any justification for imposing a higher level of public scrutiny on Sandwich Isles, particularly at a time when the new financial disclosure requirements have yet to be articulated by the Bureau.

Indeed, as stated in its original opposition to this FOIA request, routine disclosure of the more comprehensive financial documents that must accompany a waiver request would have a chilling impact on the waiver process itself. The waiver process is difficult enough without requiring petitioners and this agency to worry whether competitively sensitive data, the type of data that would not normally be disclosed even under the new disclosure requirements, might inadvertently be made available to the public in response to a FOIA request.

In weighing any public interest in such a disclosure, the FCC must also “provid[e] adequate protection of proprietary material” such as the data provided in Sandwich Isles’ Waiver Petition. *See In re Southwestern Bell Telephone Co.*, 12 F.C.C.R. 7770 (1997). The FOIA statute, and its statutory protection of commercially sensitive data, strongly suggests that the balance should weigh in favor of protection of this sensitive financial data. Consequently, the Bureau’s decision should be set aside.

III. FORM OF RELIEF SOUGHT

The Bureau's decision should be set aside and reversed in the following respects:

1. The List of Outstanding Loans in Exhibit B of Sandwich Isles' Petition for Waiver should not be disclosed to the public. The mere fact that there have been "public reports about the fact that Sandwich Isles has obtained loans to finance its activities" does not mean that this commercially sensitive information should be disclosed to the public and to competitors of Sandwich Isles. Moreover, nothing in the FCC's *USF/ICC Transformation Order* suggests that privately owned carriers will routinely be required to make this commercially sensitive information available in their annual financial disclosures.

2. The Audited Financial Statements and Notes should not be disclosed to the public, for reasons stated herein. This information is far more comprehensive than what the FCC would require carriers to make publicly available, and at this time the Bureau has yet to determine the scope and format of the annual financial disclosure obligations for ETCs.

3. The Summary of Corporate Operating Expenses included with Exhibit B of Sandwich Isles' Petition for Waiver should not be disclosed to the public for the same reasons as stated herein.

CONCLUSION

For the foregoing reasons, Sandwich Isles respectfully requests that the Commission reverse the Bureau's decision to disclose Sandwich Isles' Confidential Documents in accordance with the forgoing recommendations.

Respectfully submitted,

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July 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2012, a true and correct copy of the foregoing document was served via E-Mail and hand-delivery on the following:

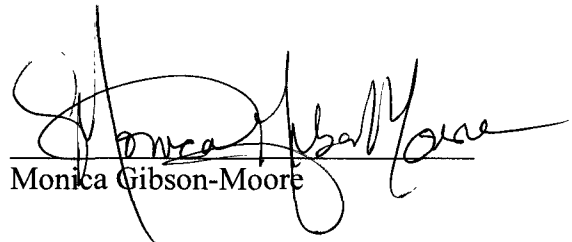
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